Supreme Court, U.S.
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No. 95-1943

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JOHN D. BARKLEY, Trustee,

Petitioner,

vs.

WILKER S. CONNER and JANICE M. CONNER; ORTHOPEDIC CLINIC 401(k) PROFIT SHARING PLAN AND TRUST AGREEMENT; PUREGRO COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Janice Conner's after-tax contributions to an ERISA qualified profit sharing pension plan are excluded from her bankruptcy estate pursuant to Section 541(c)(2) of the Bankruptcy Code (11 U.S.C. § 541(c)(2)).

2. Whether the anti-alienation provision of an ERISA qualified profit sharing pension plan is effective to prevent the turnover in bankruptcy of after-tax contributions made to the plan by the debtor/participant.

LIST OF INTERESTED PARTIES

The Petitioner is John D. Barkley, a United States Bankruptcy Trustee serving the United States Bankruptcy Court for the District of Arizona, Tucson Division. Mr. Barkley is the Chapter 7 trustee assigned to administer and liquidate the bankruptcy estate of Respondents Wilker S. Conner and Janice M. Conner.

The Respondents have been correctly identified as Wilker S. Conner and Janice M. Conner, Debtors, and The Orthopedic Clinic 401(k) Profit Sharing Plan and Trust Agreement. Throughout these proceedings, PureGro Company has been incorrectly identified as an appellee/respondent with the Conners and The Orthopedic Clinic 401(k) Profit Sharing Plan and Trust Agreement. PureGro is a creditor of the Conners' Chapter 7 bankruptcy estate, and is the party that initially challenged the exclusion of Janice M. Conner's interest in The Orthopedic Clinic 401(k) Profit Sharing Plan and Trust Agreement from her bankruptcy estate.

Respondents Conner and The Orthopedic Clinic 401(k) Profit Sharing Plan and Trust Agreement join in this Brief in Opposition.

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OPINIONS AND ORDERS ENTERED

In re Conner, United States Bankruptcy Court for the District of Arizona, No. 91-01549-TUC-LO, Adv. No. 92-0249, Minute Entry Order dated April 1, 1993.

Barkley v. Conner (In re Conner), 165 B.R. 901 (9th Cir. B.A.P. 1994)

Barkley v. Conner (In re Conner), 73 F.3d 258 (9th Cir. 1996)

Barkley v. Conner (In re Conner), United States Court of Appeals for the Ninth Circuit, No. 94-16001, Order dated February 27, 1996.

STATEMENT OF JURISDICTION

Respondents agree that the Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 1254(1).[1] However, Respondents disagree that the Court has jurisdiction pursuant to Rule 10(c), Rules of the Supreme Court of the

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[1] 28 U.S.C. § 1254(1) provides as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

United States ("Supreme Court Rules").[2] This case does not involve an important question of federal law that should be resolved by the Court. Furthermore, the Court does not have jurisdiction to entertain the question of whether The Orthopedic Clinic 401(k) Profit Sharing and Trust Agreement (the "Orthopedic Plan") is "ERISA qualified." From the very beginning of this case, Petitioner has conceded that the Orthopedic Plan is "ERISA qualified." Petitioner may not now, at this late date, challenge the ERISA qualification of the Orthopedic Plan or any part thereof. *See* discussion *infra* at pp. 12-13.

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[2]Rule 10(c), Supreme Court Rules, provides as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

STATUTES INVOLVED IN CASE

A. 11 U.S.C. § 541(c)(2)

§ 541. Property of the estate

. . . .

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

> (A) that restricts or conditions transfer of such interest by the debtor; or
>
> (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

B. 29 U.S.C. § 1056(d)(1)

§ 1056. Form and payment of benefits

. . . .

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

C. 26 U.S.C. § 401(a)(13)

§ 401. Qualified pension, profit-sharing, and stock bonus plans.

(a) Requirements for qualification -- A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section --

. . . .

(13) Assignment and alienation --

(A) In general -- A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of this preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment

or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders -- Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Respondents Wilker S. Conner and Janice M. Conner ("Respondents Conner") filed Chapter 7 bankruptcy on May 6, 1991. At that time, Janice Conner listed her interest in The Orthopedic Clinic 401(k) Profit Sharing and Trust Agreement (the "Orthopedic Plan") as excluded property on her Schedule B-4 pursuant to ERISA[3] and 11 U.S.C. § 541(c)(2).

PureGro Company, an unsecured creditor, objected to exclusion of the Orthopedic Plan. The Trustee ("Petitioner") subsequently took over PureGro's challenge and instituted an adversary proceeding to compel turnover of the entirety of Janice Conner's Orthopedic Plan interest. Following the Court's decision in *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242 (1992), Petitioner limited his turnover action to what has been denominated as the "After-Tax Account." The Bankruptcy Court for the District of Arizona denied Petitioner's Motion for Turnover on April 1, 1993.

Petitioner then appealed to the Bankruptcy Appellate Panel for the Ninth Circuit. That appeal was argued and submitted to the Panel on February 24, 1994. Following oral argument, Petitioner filed a Supplemental Memorandum. Respondents Conner objected on grounds that the Supplemental Memorandum improperly raised new arguments on appeal and was contrary to Rule 28(j), Federal Rules of Civil Appellate Procedure. The Bankruptcy Appellate Panel declined to consider Petitioner's Supplemental Memorandum and declared that the Memorandum would not be considered part of the

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[3]The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

record.

The Bankruptcy Appellate Panel in a published opinion dated April 29, 1994, affirmed the Bankruptcy Court's decision that the After-Tax Account is excluded from property of the estate. *See Barkley v. Conner (In re Conner)*, 165 B.R. 901 (9th Cir. B.A.P. 1994).

Petitioner then appealed to the Ninth Circuit Court of Appeals, which affirmed the Bankruptcy Appellate Panel in a published opinion dated January 11, 1996. *See Barkley v. Conner (In re Conner)*, 73 F.3d 258 (9th Cir. 1996). Petitioner now seeks a Writ of Certiorari.

B. Correction of Misstatements in the Petition

The Petition for Writ of Certiorari (the "Petition") contains several factual misstatements, which Respondents note and correct as follows:

(1) The After-Tax Account is part of the Orthopedic Plan.

The Orthopedic Clinic Association, P.C. (the "Clinic") maintains a defined contribution profit sharing plan for the benefit of its employees (the "Orthopedic Plan"). Respondent Janice Conner was an employee of the Clinic from 1956 until her retirement at the end of 1995 and participated in the Orthopedic Plan from its inception in 1980. In December 1986, the Orthopedic Plan was restated effective January 1, 1987, and was amended twice prior to Respondents Conner's bankruptcy filing in May 1991. These amendments are not relevant to the subject of this Petition.

The funds at issue are the "after-tax contributions"

Janice Conner made to the Orthopedic Plan, when such contributions were permitted by the Orthopedic Plan document, and the accrued interest thereon (the "After-Tax Account"). The Orthopedic Plan, as restated effective January 1, 1987, stated at Section 4.3 that "[a] participant shall not be permitted to make After-Tax Contributions on or after January 1, 1987." Petitioner's Appendix at pp. A76-A77. Accordingly, Janice Conner did not make after-tax contributions to the Orthopedic Plan after January 1, 1987, and beginning with Orthopedic Plan year 1987 she only accrued interest on her After-Tax Account.[4] When she filed bankruptcy, the funds in Janice Conner's After-Tax Account totaled approximately $38,000.

Petitioner erroneously asserts that the After-Tax Account is separate from the Orthopedic Plan and is treated differently from other parts of the Plan. *See* Petition at pp. 3 and 5. The undisputed record establishes that the After-Tax Account is part of, not separate from, the Orthopedic Plan. The After-Tax Account merely is one of three bookkeeping subaccounts comprising Janice Conner's overall "Account."

From January 1, 1987, through December 31, 1993, funding for the Orthopedic Plan included: (1) employee pre-tax contributions, pursuant to 26 U.S.C. § 401(k), of up to 3.5% of yearly compensation; (2) supplemental pre-tax contributions, pursuant to 26 U.S.C. § 401(k), by each participant in excess of 3.5% up to a maximum of 8% of yearly compensation; (3) employer matching contributions of up to 3.5% of each employee's yearly compensation; and (4) profit sharing contributions of approximately 3.5% of each employee's yearly

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[4]Following the enactment of the 1986 Tax Reform Act, the Orthopedic Plan chose to eliminate after-tax employee contributions rather than have such contributions be subject to the complex nondiscrimination test for employee contributions required prospectively by 26 U.S.C. § 401(m).

compensation.

Janice Conner's pre-tax contributions described in (1) and (2) above were credited to a bookkeeping subaccount labeled the "Pre-Tax Account." Her share of employer profit sharing and matching contributions described in (3) and (4) above were credited to a subaccount called the "Employer Account." The post-tax contributions made by Janice Conner prior to 1987 and the accrued interest thereon were credited to the "After-Tax Account" subaccount. The Orthopedic Plan provides that the sum of the amounts credited to these bookkeeping subaccounts is to be referred to as an "Account," and that the Account represents a "participant's or beneficiary's interest" in the Orthopedic Plan.

Petitioner cannot isolate the After-Tax Account for independent consideration and analysis. The After-Tax Account is part of Janice Conner's "Account," and her Account represents her entire interest in the Orthopedic Plan's trust.

(2) The Orthopedic Plan was not amended to allow withdrawal of funds from the After-Tax Account "at any time and for any reason."

Petitioner mistakenly claims that the text of the Orthopedic Plan was amended in 1988 to allow Plan participants to withdraw after-tax contributions "at any time and for any reason." *See* Petition at pp. 5-6. The quotation set forth by Petitioner is not an amendment to the text of the Orthopedic Plan. Rather, this language appeared in the summary document required by ERISA to be given to Plan participants which explained several revisions to the Plan, which became effective January 1, 1987. *See* Petitioner's Appendix at pp. A167-A175.

(3) The After-Tax Account is subject to the Orthopedic Plan's anti-alienation provision.

Petitioner erroneously asserts that, as of 1988, the After-Tax Account was no longer subject to the Orthopedic Plan's anti-alienation provision. *See* Petition at 6. No provision of the Orthopedic Plan, as restated effective January 1, 1987, excluded the After-Tax Account from the Plan's anti-alienation provision.

The entirety of Janice Conner's "Account," including the After-Tax Account, is protected from creditors by the Orthopedic Plan's anti-alienation provision, which is required by 29 U.S.C. § 1056(d)(1), 26 U.S.C. § 401(a)(13), and 26 C.F.R § 1.401(a)-13. The Orthopedic Plan's anti-alienation provision (Section 8.10) provides as follows:

> Except as provided under Section 8.9 [Plan loans], the interest herein, whether vested or not, of any Participant, former Participant or Beneficiary, shall not be subject to alienation, assignment, encumbrance, attachment, garnishment, execution, sequestration or other legal or equitable process, or transferability by operation of law in the event of bankruptcy, insolvency or otherwise.

Petitioner's Appendix at p. A125.

If the After-Tax Account were subject to alienation, the Orthopedic Plan would not comply with 26 U.S.C. § 401(a)(13), would not be tax qualified, and would not have received two favorable tax qualification determination letters from the Internal Revenue Service. *See* Respondents' Appendix. This is significant, because federal courts give deference to IRS determinations as to the tax qualification of

ERISA pension plans. *See, e.g., In re Youngblood*, 29 F.3d 225, 228 (5th Cir. 1994); *In re Kaplan*, 189 B.R. 882, 890-91 (E.D. Pa. 1995). To be tax qualified, the Plan was required to subject all of Janice Conner's Account, including the subaccount labeled the After-Tax Account, to 26 U.S.C. § 401(a)(13)'s anti-alienation rule.

There is no language in the anti-alienation clause, or any other provision in the Orthopedic Plan document, that excludes the After-Tax Account from the scope of the Section 8.10 anti-alienation provision. There also is no language in 26 U.S.C. § 401(a)(13) or 29 U.S.C. § 1056(d)(1) that excepts employee after-tax contributions from the anti-alienation rule.

ARGUMENT IN OPPOSITION TO WRIT

Respondents request that the Court deny the Petition for Writ of Certiorari, which seeks review of an opinion by the Ninth Circuit Court of Appeals reported at 73 F.3d 258 (9th Cir. 1996). The Petition should be denied for three reasons. First, the After-Tax Account is part of the Orthopedic Plan, and from the very beginning of this case, Petitioner has conceded that the Orthopedic Plan is "ERISA qualified." Accordingly, this case is not the appropriate vehicle for the Court to elaborate upon the issue of ERISA qualification.

Second, even though lower federal courts have stated two somewhat different tests for determining ERISA qualification, there is no disagreement amongst the **circuits** as to what makes a pension plan "ERISA qualified." Finally, the most compelling reason for denying the Petition is that the Ninth Circuit has correctly applied and interpreted *Patterson v. Shumate*. In sum, there is no "compelling" reason for the Court to grant the Petition for Writ of Certiorari. *See* Rule 10, Supreme Court Rules.

A. Petitioner has conceded that the Orthopedic Plan is "ERISA qualified."

Petitioner urges the Court to grant review in order to define "ERISA qualified." *See* Petition at pp. 24-29. However, the issue of whether the Orthopedic Plan is "ERISA qualified" is not properly before the Court, because Petitioner conceded this issue below. It is well established that the Court will not consider issues not presented to and passed upon by lower courts. *See, e.g., Patrick v. Burget*, 486 U.S. 94, 99 n. 5, 108 S.Ct. 1658, 1662 n. 5, 100 L.Ed.2d 83 (1988).

Petitioner's concession that the Orthopedic Plan is

"ERISA qualified" was central to the Bankruptcy Appellate Panel's decision to affirm the Bankruptcy Court:

> Since the trustee concedes in his opening brief that "the funds at issue [after-tax dollar contributions] are part of an overall 'ERISA-qualified' Plan . . .," the Conners' entire ERISA plan should be excluded from the estate under *Shumate's* interpretation of § 541(c)(2). . . . Since it is undisputed that this is an ERISA-qualified plan with an anti-alienation provision, we hold that the entire plan, including the employee after-tax contributions, qualifies under the § 541(c)(2) standards articulated in *Shumate*.

Barkley v. Conner (In re Conner), 165 B.R. at 903.

Thus, the courts below did not blindly "assume" that the Orthopedic Plan was ERISA qualified or "defer" to the Plan's draftsmen on this point. *See* Petition at 4 and 17. Rather, first the Bankruptcy Appellate Panel and then the Ninth Circuit concluded that the Orthopedic Plan is "ERISA qualified" in part, because Petitioner had expressly conceded this issue. Petitioner may not at this late date challenge the ERISA qualification of the Orthopedic Plan.[5]

Petitioner complains that "[t]he courts below assumed, without discussion, that all of the Debtor's accounts were ERISA-qualified." Petition at 17. However, the accounts constituting Janice Conner's Account are not separate and

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[5]It is Respondents' position that the Orthopedic Plan in fact is qualified under both ERISA and the Internal Revenue Code. Thus, even if Petitioner had not conceded this issue below, the Bankruptcy Appellate Panel and the Ninth Circuit still would have correctly concluded that the Plan is "ERISA qualified."

distinct, but rather are bookkeeping subaccounts that when aggregated represent Janice Conner's Plan interest. All these accounts are created and governed by ERISA, the tax qualification requirements of 26 U.S.C. § 401(a), *et seq.*, and the same Plan document. For example, Janice Conner's After-Tax Account, like the other subaccounts that comprise her "Account," is subject to the 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1) anti-alienation rule, the 26 U.S.C. § 401(a)(9) minimum distribution rules, the 26 U.S.C. § 401(a)(11) beneficiary designation rules, the 26 U.S.C. § 411(a)(11) consent to distribution rules, the 26 U.S.C. § 4975 and 29 U.S.C. § 1106 prohibited transaction rules, and the fiduciary responsibility and administration and enforcement rules of Parts 4 and 5 of Title I of ERISA.

Finally, if the Plan is ERISA qualified, as conceded by Petitioner, then all of the Plan accounts necessarily are as well. When the issue of ERISA qualification is raised, the question is **not** whether one or more plan accounts are ERISA qualified, but rather whether the Plan is ERISA qualified, an issue Petitioner has conceded all along.

B. There is no split amongst the circuits as to the definition of "ERISA qualified."

Petitioner would have the Court believe that there is a split amongst the **circuits** as to the meaning of "ERISA qualified." *See* Petition at 25-27. However, although there is slight disagreement amongst **lower** federal courts as to the elements of ERISA qualification,[6] to date, the Ninth Circuit is

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[6]Lower federal courts presented with the issue of whether a particular pension plan is "ERISA qualified" generally have followed either *In re Hall*, 151 B.R. 412 (Bankr. W.D. Mich. 1993) or *In re Hanes*, 162 B.R. 733 (Bankr. E.D. Va. 1994).

the only circuit to have applied and interpreted *Shumate* and addressed the question of ERISA qualification. Thus, this is not a situation where a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a), Supreme Court Rules. This case is unlike *Varity Corp. v. Howe*, ___ U.S. ___, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), where the Court granted certiorari "because the Courts of Appeal have disagreed about the proper interpretation of ERISA, § 502(a)(3)." 116 S.Ct. at 1069.

C. The Ninth Circuit has correctly interpreted *Patterson v. Shumate.*

The Ninth Circuit is the first federal appellate court to develop a substantial body of case law interpreting and applying *Patterson v. Shumate*. *See Barkley v. Conner (In re Conner), supra*; *Arkison v. UPS Thrift Plan (In re Rueter)*, 11 F.3d 850 (9th Cir. 1993); *Pitrat v. Garlikov*, 992 F.2d 224 (9th Cir. 1993); *Reed v. Drummond (In re Reed)*, 951 F.2d 1046 (9th Cir. 1991), *superseded by*, 985 F.2d 1026 (9th Cir. 1993). In each of these cases, the Ninth Circuit correctly found the debtor's control over funds in an ERISA qualified pension plan to be irrelevant[7] and held that *Shumate* only requires an ERISA

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[7]Virtually every court having addressed the question has agreed with the Ninth Circuit that *Shumate* renders irrelevant the degree of a debtor's control over assets in an ERISA qualified plan in determining the exclusion of those assets under 11 U.S.C. § 541(c)(2). *See, e.g., In re Baker*, 195 B.R. 386 (Bankr. N.D. Ill. 1996); *In re Holst*, 192 B.R. 194 (Bankr. N.D. Iowa 1996); *In re Winkler*, 164 B.R. 728 (W.D.N.C. 1994); *In re Hanes, supra*; *In re Pierce*, 1994 WL 266381 (Bankr. W.D. Pa. June 9, 1994); *In re Miller*, 153 B.R. 269 (Bankr. D. Minn. 1993); *In re Dunham*, 147 B.R. 13 (Bankr. E.D.N.C. 1992); *In re Nudo*, 147 B.R. 68 (Bankr. N.D.N.Y. 1992). *But see In McClellan*, 152 B.R. 252 (Bankr. C.D. Ill. 1993), *affirmed*, 162 B.R. 525 (C.D. Ill. 1993), *reversed*, 45 F.3d 432 (7th Cir. 1995).

qualified plan's anti-alienation provision to be enforceable under ERISA to satisfy the literal meaning of Bankruptcy Code § 541(c)(2).

In the case at issue, the Ninth Circuit interpreted *Shumate* as follows in holding that Janice Conner's interest in the After-Tax Account is excluded from her bankruptcy estate pursuant to 11 U.S.C. § 541(c)(2):

> The Supreme Court, however, in *Shumate*, held that the anti-alienation provision in ERISA qualified pension plans was a restriction on transfer enforceable under "applicable non-bankruptcy law." It rejected *In re Daniel*, 771 F.2d 1352 (9th Cir. 1985) and *Matter of Goff*, 706 F.2d 574 (5th Cir. 1983). 504 U.S. at 760-62, 112 S.Ct. at 2248. Thus, under *Shumate*, ERISA plans are exempted from the bankruptcy estate, even though ERISA only requires restraints on alienation to third parties. In interpreting the § 541(c)(2) exemption to cover ERISA plans, the Supreme Court appears to have discounted any distinctions based on the debtors' control of their assets. Thus, the appellant's argument that we should conduct a functional analysis focusing on the debtors' control of the assets in the ERISA Plan has been rejected by the Supreme Court.

73 F.3d at 260.

Shumate does not differentiate amongst the types of accounts comprising the plan or the degree of control exercised by the debtor over the accounts. Under *Shumate*, **any** interest in an ERISA qualified plan containing an anti-alienation provision enforceable under ERISA is excluded from the estate. 112 S.Ct. at 2246. Here, it is not disputed that the Orthopedic Plan is ERISA qualified, and that it contains an anti-alienation

provision enforceable under ERISA. It also is not in dispute that the Orthopedic Plan is tax qualified under the Internal Revenue Code, as exemplified by the two favorable IRS determination letters.

Petitioner misreads *Shumate* as holding that funds in an ERISA qualified plan containing the required anti-alienation provision are excluded under § 541(c)(2) only if the restriction on alienation is enforceable under state law (i.e., creates a spendthrift trust). Petitioner's misunderstanding has been addressed by the courts:

> This focus on state spendthrift trust law, which looks to the reality behind the non-alienation provision is misplaced. ERISA requires a plan to have a non-alienation provision, and that provision has been vigorously enforced. No more inquiry need be made to determine whether the trust is controlled by the settlor or the beneficiary, or whether they are the same person.
>
> . . .
>
> . . . . [A]ll ERISA-qualified plans, which by definition have a non-alienation provision, constitute "applicable nonbankruptcy law" and contain enforceable restrictions on the transfer of pension interests. . . . That conclusion rests not on the reality of the particular beneficiary-settlor-trust relationship in issue, but instead on the status of the plan as ERISA-qualified.

In re Foy, 164 B.R. 595, 599 n. 13 (Bankr. S.D. Ohio 1994) (quoting *Shumate v. Patterson*, 943 F.2d 362, 364-65 (4th Cir. 1991)). *See also In re Holst*, 192 B.R. at 199 ("*Patterson* excluded a debtor's ERISA plan benefits from the bankruptcy estate without reference to whether the pension plan qualified as a spendthrift trust under state law."); *In re Baker*, 195 B.R. at 390-91.

The requirement of 29 U.S.C. § 1056(d) and 26 U.S.C. § 401(a)(13) is that the beneficial interest not be "assigned" or otherwise "alienated." The anti-alienation rules are not designed to prohibit distributions to plan participants, since the ultimate purpose of retirement plans is to distribute monies to participants. Instead, the purpose of the anti-alienation rule is to protect pension and trust funds from third party creditors, and it is not viewed as a spendthrift provision. *See Coar v. Kazimir*, 990 F.2d 1413, 1420-21 (3rd Cir. 1993); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 124 (2nd Cir. 1979); *Cartledge v. Miller*, 457 F. Supp. 1146, 1156 (S.D.N.Y. 1978); *Foy*, 164 B.R. at 599 ("In the instant case, the ERISA anti-alienation provision is enforceable against the debtor's general creditors and therefore it is enforceable against the trustee in bankruptcy.").

Thus, even though Janice Conner had the ability to withdraw funds from the After-Tax Account, ERISA and the Internal Revenue Code still prohibited her from **assigning** the monies to third parties or otherwise voluntarily **alienating** her interest. *See General Motors Corp. v. Buha*, 623 F.2d 455, 460 (6th Cir. 1980) (29 U.S.C. § 1056(d)(1) must be read as including both voluntary and involuntary transfers); *Vink v. SHV No. America Holding Corp.*, 549 F. Supp. 268, 270 (S.D.N.Y. 1982) ("Taken together [29 U.S.C. § 1056(d) and corresponding regulations], these provisions prohibit both the voluntary and involuntary assignment of vested pensions.").

CONCLUSION

Janice Conner is precisely the type of individual Congress intended to protect when it enacted ERISA. She was a mid-level employee of the Clinic and participated in the Orthopedic Plan from its inception to provide for her retirement. Janice Conner embodies the very spirit of ERISA,

and it would be a travesty to permit Petitioner to undo her efforts. Congress designed ERISA to ensure that employees and their beneficiaries would not be deprived of the retirement benefits which they anticipated and to ensure "'if a worker has been promised a defined pension benefit upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--he will actually receive it.'" *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 214 (1986) (quoting *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984)).

Respondents request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Ellen M. Van Riper
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4201 North 24th St., Ste. 300
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(602) 262-5911

Attorney for Respondent Orthopedic Clinic 401(k) Profit Sharing Plan

APPENDIX

APPENDIX

Exhibit 1 -- August 26, 1988 letter from Internal Revenue Service District Director to The Orthopedic Clinic

Exhibit 2 -- June 17, 1992 letter from Internal Revenue Service District Director to The Orthopedic Clinic

Exhibit 1

Department of the Treasury

Internal Revenue Service
District Director

1100 Commerce Street
Dallas, TX 75242

Date: AUG 26 1988

THE ORTHOPEDIC
CLINIC
C/O KATHERINE
WHEELER
THE WYATT COMPANY
100 W. CLARENDON 800
PHOENIX, AZ 85013

Employer Identification Number:
86-0087236
File Folder Number:
860000714
Person to Contact:
EP TECHNICAL
ASSISTOR -- 22
Contact Telephone Number:
(214) 767-1204
Plan Name:
ORTHOPEDIC CLINIC
401K PROFIT
SHARING PLAN &
TRUST AGREEMENT
Plan Number: 002

Dear Applicant:

Based on the information supplied, we have made a favorable determination on your application identified above. Please keep this letter in your permanent records.

Continued qualification of the plan will depend on its effect in operation under its present form. (See section 1.401-1(b)(3) of the Income Tax Regulations.) The status of the plan in operation will be reviewed periodically.

The enclosed document describes the impact of Notice 86-13 and some events that could occur after you receive this

letter that would automatically nullify it without specific notice from us. The document also explains how operation of the plan may affect a favorable determination letter, and contains information about filing requirements.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

This determination is subject to your adoption of the proposed amendments submitted in your or your representative's letter dated August 15, 1988. The proposed amendments should be adopted on or before the date prescribed by the regulations under Code section 401(b).

We have sent a copy of this letter to your representative as indicated in the power of attorney.

This determination letter is applicable for the amendment(s) adopted on Dec. 31, 1987.

The cash or deferred arrangement meets the requirements of section 401(k) as interpreted by the proposed regulations.

If you have any questions concerning this letter, please contact the person whose name and telephone number are shown above.

Sincerely yours,
/s/
Gary O. Booth
District Director

Enclosures:
Publication 794
OPWBP 515

Exhibit 2

DEPARTMENT OF THE TREASURY

INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
1100 COMMERCE STREET
DALLAS, TX 75242

Employer Identification Number:
86-0087236

Date: JUN 17 1992

File Folder Number:
860000714

THE ORTHOPEDIC CLINIC
C/O ROBERT J. WERNER
TWO NORTH CENTRAL
SUITE 1600
PHOENIX, AZ 85004-2393

Person to Contact:
JILL RUTHERFORD

Contact Telephone Number:
(214) 767-1204

Plan Name:
THE ORTHOPEDIC CLINIC PROFIT SHARING THRIFT PLAN AND TRUST

Plan Number: 002

Dear Applicant:

We have made a favorable determination on your plan, identified above, based on the information supplied. Please keep this letter in your permanent records.

Continued qualification of the plan under its present form will depend on its effect in operation. (See section 1.401-1(b)(3) of the Income Tax Regulations.) We will review the status of the plan in operation periodically.

The enclosed document explains the significance of this favorable determination letter, points out some features that may affect the qualified status of your employee retirement plan, and provides information on the reporting requirements for your plan. It also describes some events that automatically nullify it. It is very important that you read the publication.

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

This determination is subject to your adoption of the proposed amendments submitted in your letter dated May 29, 1992. The proposed amendments should be adopted on or before the date prescribed by the regulations under Code section 401(b).

This determination letter is applicable for the amendment(s) adopted on January 29, 1992.

This letter is based upon the certification and demonstrations you submitted pursuant to Revenue Procedure 91-66. Therefore, the certification and demonstrations are considered an integral part of this letter. Accordingly, YOU MUST KEEP A COPY OF THESE DOCUMENTS AS A PERMANENT RECORD OR YOU WILL NOT BE ABLE TO RELY ON THE ISSUES DESCRIBED IN REVENUE PROCEDURE 91-66.

We have sent a copy of this letter to your representative as indicated in the power of attorney.

If you have questions concerning this matter, please contact the person whose name and telephone number are shown above.

Sincerely yours,
/s/
Gary O. Booth
District Director

Enclosures:
Publication 794
PWBA 515

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